In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT, v. WILLIAM A. CLARK, APPELLEE. } No. 359.

REPLY BRIEF FOR APPELLANT.

Clark's connection with this case is confined to the *exact* issue raised by the pleadings. It is this: Was he a *bona fide* purchaser from Cobban? Does the proof establish the allegation of the bill:

> That the said defendant, William A. Clark, well knew in a general way, if not in detail, at the time the said conveyances of all of said lands were made to him by said Cobban, the facts hereinbefore stated, and well knew, and had good cause to know, that the said lands had been entered in violation of the laws of Congress, under which said entries were made.

If this is established the clause in the bill that Cobban claimed in so doing to act for the use and benefit of the appellee herein can be disregarded. It is immaterial whether the technical relation of principal and agent existed or not, and therefore no such allegation need have been inserted in the bill and no proof is required. Counsel for appellee recognize this

fact; they well know that in order to obtain an affirmance of the decree their proof must harmonize with their answer. Hence their persistence in making the claim that the deeds mentioned in their answer and offered in evidence by them represent absolute sales for cash, and that Clark, at the time, had no knowledge, or the means of knowledge, as to the methods adopted by Cobban in acquiring possession of and title to said lands.

It is, however, evident from its opinion that the Circuit Court of Appeals based its decision in part on the theory that it was incumbent on appellant to establish *agency*. Much is made of the fact that Clark allowed Cobban such a large profit. This also was referred to at time of argument. It is necessary, therefore, to state the exact facts. In the first place, the court made a most serious mistake in finding that it was conceded that Clark paid Cobban $217,571.25 *for the lands in question*. The concession was that said amount was paid for *all* the lands obtained from Cobban. Only a part are involved in the present suit. Others are in a suit now pending in the Circuit Court for Montana. Still others were acquired with scrip. In this suit but 78 patents are involved. Four can not be reached in this suit, entrymen having only sold their timber. The record supplies data which fairly enables us to ascertain the amount paid for said lands. In volume Pleadings and Index, pp. 214, 219–223, is a list of the estimates furnished by Cobban of timber on 67 of these entries. The total is 53,836,000 feet, an average of 803,522 feet per entry. At $1.25 per M the total average cost

to Clark is $1,005.28 per entry. (Record, vol. 9, p. 4516.) Eighty-two entries, at $1,005.28, is $82,432.96 instead of $217,571.25. These figures are practically exact. In reply to the question as to how we could account for the large profit allowed Cobban by Clark we submit the following:

The Government's price is substantially $400 in each entry. Each entryman was paid $100. All of the entrymen had to inspect the land, then go to the land office to make their first filing, and return home; publication of their entries had to be paid for. At the expiration of sixty days they all had to return with their witnesses to the land office, one of said offices being at least 150 miles distant from their homes. All expenses were paid by Cobban. There is no evidence giving exact expenses, but we estimate $50 in each case.

Cobban had an estimator named Hambley on these descriptions. Men estimating timber in tree are experts and compensated accordingly. For this we estimate $50 in each entry. According to written contract (see appellant's original brief, p. 15) Cobban paid Griswold 5 cents per M of timber, which amounts to $50 in each case. It further appears that after the first 40,000,000 sold by Cobban to Clark, Cobban deducted 5 cents per M feet, because of his receiving balance due before expiration of option, or $50 average on each entry. (Record, vol. 9, p. 4448.) Thus we have a total of $700 per entry, not including his personal expenses. Deducting $700 from $1,005.28 leaves Cobban $305.28 per entry as his

profit for the laborious and perilous undertaking of obtaining the lands herein involved from the Government. In other words, between $24,000 and $25,000.

We repeat, the only question in the case is the question of bona fides. This can be determined irrespective of the question of agency. If the facts and circumstances are such as to convince that Clark, at the time he completed his purchases, had knowledge or the means of knowledge of antecedent frauds, he was not a bona fide purchaser. Appellant insists that he did have such knowledge, and in support of its contention it submits these further facts. The deeds offered in evidence by the appellee are as follows:

1.	Date of deed,	July 29, 1899,	consideration	...	$7,656.25
2.	" " "	July 29, 1899,	"	...	$5,437.50
3.	" " "	Sept. 16, 1899,	"	...	$21,875.00
4.	" " "	Sept. 16, 1899,	"	...	$15,031.25
5.	" " "	Nov. 11, 1899,	"	...	$35,512.50
6.	" " "	Nov. 13, 1899,	"	...	$33,718.75
7.	" " "	Jan. 9, 1900,	"	...	$18,850.00
8.	" " "	Jan. 9, 1900,	"	...	$9,481.25
9.	" " "	June 16, 1900,	"	...	$62,502.50
10.	" " "	June 16, 1900,	"	...	$3,325.00
					$213,390.00

All of these conveyances, except the first four, warranty deeds in form, were simply mortgages to secure Clark for loans to Cobban.

This was admitted by Clark when confronted with his own letters and contracts. (Record, vol. 10, p. 5104.)

It was so found by the circuit court of appeals. It says:

> These (first four), according to the evidence, were the only absolute sales from their inception by Cobban to the appellee.

There is not one word of testimony in the record to the contrary. Therefore, appellee's proof makes a case radically different from that made by his answer. This, of course, can not be done. Said court also finds:

> That it is true that the record shows that the appellee knew that some of the money he loaned Cobban was intended to be used by him in acquiring additional lands; it does not show that the appellee knew or had any reason to know that he expected to acquire them fraudulently or in any way unlawfully.

In this conclusion we submit that the majority erred; that the facts are as found by Judge Gilbert in his dissent, as follows:

> I think there is enough in the record which is before us to show that facts came to the knowledge of the defendant in error and his agents sufficient to put them upon inquiry as to the manner in which the lands were obtained from the United States. The deeds from the various entrymen to Cobban showed that the latter was carrying out a large and comprehensive scheme to obtain the lands. Seventeen of those deeds were made on September 16, 1899, 29 were executed on November 11, and 22 were executed on November 13.

> The deeds also showed that the final receiver's receipts had been issued but a short time before the execution of the deeds. Some were issued but two days before the deeds. Others were issued at intervals of from one week to three or four weeks prior to the deeds. These are significant facts, and indicated a concert of action, of which Cobban was the engineer. The evidence shows also that the inspection of these lands by the defendant's agents was contemporaneous with the entries, and that large sums were loaned by the defendant in error to Cobban, to be used by him for the purpose of obtaining title to these lands. There are many other facts and circumstances in the evidence pointing to the conclusion that the defendant in error knew enough of the methods by which the lands were obtained to put him upon inquiry.

In determining the question of *bona fides* the great point to be decided is, as to whether the majority of the court below or Judge Gilbert is right on the question of prior negotiations.

Judge Ross, in his opinion, says:

> Counsel for the Government contend that the appellee commenced negotiating for the lands in question before he made his purchases. We do not think that the fair conclusion to be drawn from the evidence.

In this he clearly erred.

Clark admits that he had to have timber. In his testimony he says:

> It was neccessary for self-protection that I should look out for future supplies. It was

> very natural that I should desire to secure an ample supply of lumber. (Rec. Vol. X, page 5114.)

Clark admits that he had a conversation with Cobban about the purchase of timber lands, the location of the timber, the character of it, and the price to be paid, in the spring of 1899, probably about March. (Record, vol. 10, p. 5116.)

Clark and Cobban had been acquainted for ten years prior to that time; they had been tenants in common in mineral lands, and interested in the Valley Addition to the city of Butte, Mont.

In reply to the question,

> Had you been associated with Cobban enough to form an idea of him, as to his judgment in buying timber,

Clark answered:

> My impression is that he was a very clever man. (Record, vol. 10, page 5115.)

Cobban had found out how land was being taken up under the timber and stone act in Oregon, and he determined to obtain the timber by adopting the same methods in Montana. (Record, vol. 10, p. 5168.) The first step he took was to make the contract with Griswold (copy of which appears on p. 17 of appellant's brief).

In a letter to Wethey, dated June 9, 1899, Clark says:

> I note that Mr. McLaughlin thought it would be greatly to our advantage and enable us to have a check on the Big Blackfoot people if

> we should secure some timber on the Big Blackfoot. He may be right about this. (Record, vol. 9, p. 4670.)

This in reply to Wethey's letter to him, in which he says:

> McLaughlin says that we have now secured about as much timber on Nine Mile as what the Blackfoot people own. He says that they will pursue all kinds of tactics in order to interfere with his operations. He is very anxious to secure some lumber on the Big Blackfoot, so that he can hold them in check by retaliating there if they should annoy him at Nine Mile. If he secured the lumber on the Big Blackfoot he probably could exchange it with them for an equivalent amount on the Nine Mile, as he thinks they would be very anxious to get rid of him, to prevent him from operating on the Blackfoot entirely. (Record, vol. 9, p. 4671.)

Clark determined to buy timber. He first thought 40,000,000 feet would be sufficient. (Record, vol. 9, p. 4509.) Cobban furnished Clark with this exact amount, in the first four deeds above set forth He received from Clark, through McLaughlin, $50,000, which paid for the timber, at the agreed price of $1.25 per thousand feet. (Record, vol. 9, p. 4510.)

During the time that Cobban was getting together this 40,000,000 feet McLaughlin was constantly urging Clark to buy a very large amount of timber on the Blackfoot. (Record, vol. 6, p. 2690; vol. 9, pp. 4481, 4502.) Clark acted upon this advice, and did, in the course of the following year, by the deeds above

named, obtain title to timber lands on which the estimates show nearly 200,000,000 feet of timber. (Record, vol. 10, p. 5113.)

As we have seen, these were not absolute deeds, but were simply securities for loans, with an option to purchase within four months, if Clark determined to take the absolute title. We thus see that there is no basis for the claim that said deeds were "out and out" sales. There is equally no basis for the claim that the estimates were made only after Cobban had obtained title to the lands. This is established beyond question by the schedule in our original brief. Notwithstanding that therein it conclusively appears that the period which elapsed from the time Cobban received deeds from the entryman to the time he sold to Clark was too short to admit of the possibility of estimates being made after Cobban received title, on page 7 of their supplemental brief counsel for appellee persist in making the claim that it was after the time when the final receipts had been issued that the lands were examined by appellee for the purpose of ascertaining the quantity of timber thereon.

On page 4 they say the tabulated statement is conclusive that the receiver's receipt was of date in some instances, three months prior to the date of the deed from Cobban to Clark, *and in every instance the land had been entered at the Land Office, and final receipt issued therefor long prior to the conveyance to Cobban, or by Cobban to Clark, and corroborates Cobban in his statement that he never attempted to negotiate for the transfer of lands to which he did not have full title.*

We ask the court to compare this claim with the following figures, taken from said tabulated statement.

Name.	Date of receiver's receipt.	Date of deed to Cobban.	Date of Cobban's deed to Clark.
Charles H. Jemison	Nov. 6, 1899	Nov. 6, 1899	Nov. 11, 1899
John L. Deering	Oct. 20, 1899	Nov. 6, 1899	Nov. 11, 1899
Herbert Eddy	Oct. 27, 1899	Oct. 27, 1899	Nov. 11, 1899
Mary Eddy	Oct. 27, 1899	Oct. 27, 1899	Nov. 11, 1899
Abraham J. Jemison	Nov. 6, 1899	Nov. 6, 1899	Nov. 11, 1899
Zora Jemison	Nov. 6, 1899	Nov. 6, 1899	Nov. 11, 1899
James W. Wheaton	Oct. 27, 1899	Oct. 27, 1899	Nov. 11, 1899
Harriet Bryan	Sept. 4, 1899	Sept. 4, 1899	Sept. 16, 1899
Belle Bryan Gilles	Sept. 14, 1899	Sept. 16, 1899	Sept. 16, 1899
Laura Roll	Oct. 7, 1899	Oct. 7, 1899	Nov. 11, 1899
Levi B. Cyr	Dec. 18, 1899	Dec. 22, 1899	Jan. 9, 1900
Vital Cyr	Dec. 18, 1899	Dec. 22, 1899	Jan. 9, 1900
Martha E. West	Nov. 10, 1899	Nov. 10, 1899	Nov. 13, 1899
Lizzie T. Catlin	Nov. 10, 1899	Nov. 10, 1899	Nov. 13, 1899
Dan McGillis	Nov. 7, 1899	Nov. 7, 1899	Nov. 11, 1899
James Mize	Nov. 6, 1899	Nov. 6, 1899	Nov. 11, 1899
Jennie Mize	Nov. 6, 1899	Nov. 6, 1899	Nov. 11, 1899
Oliver E. Muchmore	Sept. 1, 1899	Sept. 8, 1899	Sept. 16, 1899
Elizabeth E. Muchmore	Sept. 1, 1899	Sept. 8, 1899	Sept. 16, 1899
Albert F. Muchmore	Sept. 1, 1899	Sept. 9, 1899	Sept. 16, 1899
Guy W. Muchmore	Sept. 1, 1899	Sept. 9, 1899	Sept. 16, 1899
John H. Hardy	Nov. 10, 1899	Nov. 11, 1899	Nov. 11, 1899
Elvira M. Hardy	Nov. 10, 1899	Nov. 11, 1899	Nov. 11, 1899

This comparison speaks for itself. It is a mathematical demonstration that there is no basis in fact for the claim of counsel.

On page 7, in order to support their claim that the estimates were made after Cobban had obtained title to the land, duly entered at the land office, they refer to excerpts taken from the testimony of McLaughlin.

As Clark admits that he loaned money to Cobban (p. 5104), after denying it (p. 5108), and Wethey admits that the deeds were mortgages (p. 4402), so McLaughlin, under the leadership of counsel, gives testimony tending to establish their claim; but here, too, we find that he contradicts himself, admitting that the estimates were made before Cobban received title.

In his testimony the following appears (record, vol. 6, p. 2702):

> Q. Had your estimates been made before you got the deeds?
>
> A. Why, certainly. I used to get the estimates about once a week.
>
> Q. Where from?
>
> A. From Sparks.
>
> Q. Where would Sparks get his data on the land that he was to make his measurements of?
>
> A. Well, the first batch I gave him the numbers of pretty near all of them when he was in the field.
>
> Q. Where did you get your numbers?
>
> A. I got them from Mr. Cobban.

McLaughlin then says:

> Cobban had estimators, one or two or three or four. I know he had one man in the field, and my estimators and him used to work together up in the Blackfoot country. (Record, vol. 6, p. 2703.)

Then McLaughlin says: Hambly was Cobban's estimator, and Senator Clark's estimator was Mr. Sparks; when Sparks and Hambly had estimated the timber growing on these different descriptions, Sparks

would send the results down to him. He further testified as follows:

> Mr. Sparks, or Mr. Cobban's man used to send his estimates to Mr. Cobban, and then we would get the estimates together, and sometimes my estimation would be under and sometimes it would be over, and we would get together and adjust the estimate.
>
> Q. Then, as a matter of fact, Mr. Sparks had the work substantially done before the deeds were tendered to you at all?
>
> A. Yes, sir.
>
> Q. The only work that you did, or had to do when the deeds were tendered to you by Cobban, was to verify them and to see that the descriptions tallied, was it not, Mr. McLaughlin?
>
> A. Yes, sir; and agree on the estimate.
>
> Q. Had the work of making the estimates been made?
>
> A. Oh, yes; they had been made; certainly.
>
> Q. The work of the estimates, then, had been made before the deeds were presented?
>
> A. That had been made; yes, sir. (Record, vol. 6, p. 2705.)

These lands were not bought by the acre, but on the basis of so much per thousand, according to prior estimate. (Record, vol. 9, p. 4516.)

On September 11 Wethey writes McLaughlin as follows:

> I would not care to exceed Mr. Clark's limit of $50,000 without his instructions. * * * I will write to Mr. Clark and ask him whether he feels inclined to overstep his limit of $50,000.

> * * * *I think you may as well call in your estimator and stop the expense of estimating any more.* (Record, vol. 9, p. 4665.)

This, we contend, disposes of the question of estimates, and conclusively establishes our claim that the estimates had all been completed before Cobban received his deeds from the entrymen, and further conclusively establishes our claim that the Circuit Court erred in not finding that the appellee commenced negotiating for the lands in question before he made his purchases.

On page 8 of their supplemental brief counsel for appellee say there is no proof that any of the money borrowed from Clark was used to secure lands.

On October 16 (record, vol. 9, p. 4418) Clark, in a letter to Wethey, says:

> I have yours of the 14th instant, relating to Mr. Cobban's proposal for a loan. * * * I note that his desire is to realize the money he has invested, *and to secure additional timber lands.* I notice that he has 30,000,000 feet located with script. Would he also give me an option on the 30,000,000 feet, with an additional loan of what he needs; also upon an advance of 75 cents per thousand upon that? I am willing, all these conditions being complied with, to make a loan on the 40,000,000 feet of timber.

This letter shows that Clark was loaning money to Cobban, not only on lands which he had already secured title to, but in order to enable him to secure additional timber lands.

In Wethey's testimony this appears:

> Q. Who informed you of the fact that he wanted to use this money to secure additional timber lands?
>
> A. Mr. Cobban. His name is signed to this letter of the 14th, and it is marked "O. K. R. M. Cobban." (Record, vol. 9, p. 4558.)

On page 8 of their supplemental brief counsel for appellee contend that the claim made in our original brief that Clark loaned Cobban $10,000 to buy lands, which at the time had simply been located upon, on the mere promise of Cobban to convey to him when entries were completed and arranged, and that when this was done he would make Cobban an additional loan, upon his first paying the $10,000, is unsupported by any evidence, and is disproved by the note itself. The record shows that Cobban obtained this $10,000 from the bank in this way: Wethey says:

> I think quite likely I told the cashier that we had some negotiations with Mr. Cobban, and that if the deal went through, before paying him any more money I would protect the bank. The subject of loaning Mr. Cobban a considerable amount of money had been under way for some time, and I expect that it was my impression at that time that the loan would be made, and it was made. (Record, vol. 9, 4536.)
>
> Q. Now, then, you say that on the 18th of the following month the proposition was accepted, and certain moneys paid to him?
>
> A. Yes, sir.

Q. And the first bit of money that was used by you was to take up this note for $10,000?

A. Yes, sir.

Q. Now, how much did you give him at that time?

A. He gave a new note for $41,538.75, which covered all that I paid him, including the $10,000 I paid the bank.

Q. Let me understand you, Mr. Wethey. When this matter was consummated you paid the bank $10,000 and interest and took up the note?

A. Yes, sir. (Record, vol. 9, 4538.)

On page 7, for the evident purpose of again misleading the court, counsel say:

> Sparks was not employed by appellee, but was employed by the Western Lumber Company, and made the estimates which were used in buying the lands.

The record shows that Clark himself bought all of this land and that the Western Lumber Company was simply one of Clark's many corporations. He himself says:

> The capital stock of said company is $85,000, of which I own seven-eighths, or three-fourths at least. * * * Mr. McLaughlin, Judge Bickford here, and Mr. Wethey were small stockholders.
>
> Q. Enough to make your company?
>
> A. Yes, sir; enough to make directors. (Record, vol. 10, p. 5115.)

On page 5, counsel makes the following statement:

> It is true that the parties were under indictment, but they were not hostile witnesses, as will be clearly shown by their testimony.

Our answer is, that they were necessarily hostile witnesses from the fact that they were at the time they gave their testimony, and most of them are now, under indictment for perjury in swearing that they had not taken up the lands on speculation, and by reason of a prior agreement with Cobban. They could not admit that they had taken up the lands on speculation, and by reason of a prior agreement with Cobban, without admitting that their statements in the land office were false, and thereby admitting that they were guilty of perjury.

Under such circumstances all that the Government could do was to drag out from them the facts of the case and then ask the courts to find therefrom speculation and prior agreement.

If the court desires to further examine the record on the subject of prior negotiations, contracts, and loans made by Clark to Cobban, see testimony of Wethey, record, volume 9, page 4385 to and including page 4676. Some of the specific pages are as follows:

> Pages 4413, 4415, 4417, 4418, 4419, 4427, 4429, 4430, 4432, 4436, 4484, 4490, 4501, 4502, 4514, 4517, 4529, 4536, 4546, 4554, 4571, 4598, 4600, 4602, 4603, 4612, 4615, 4624, 4663, 4664, 4670, and 4672.

The testimony appearing in this record conclusively establishes that the most intimate relations existed between Cobban and Clark for over a year, which resulted in Clark acquiring from Cobban the lands named and described in the patents now sought by the appellant to be canceled; that McLaughlin, who was the trusted timber agent of Clark, was at all times on the ground and must have had actual knowledge of the exact methods adopted by Cobban.

Wethey, his general manager, and Bickford, his attorney, must also have had actual knowledge. If not, they were grossly negligent. Notice to them was notice to appellee.

If appellee did not have actual notice, then this rule applies:

> Where a person has not actual notice, if the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired the notice with which it is sought to affect him and that he would have acquired it but for his gross negligence in the conduct of the business in question, he will be treated as if he had notice.
>
> Wilson *v.* Wall, 73 U. S., 83, 91.
>
> The rule is universal and elementary that, if a purchaser in any form receives notice * * * before he has *completely* acquired or perfected his own interest, under the purchase, his position as bona fide purchaser is thereby destroyed, though he may have paid a valuable consideration.
>
> Pomeroy Eq. Juris., secs. 753, 762

Applying these rules to the admitted facts of this case, it is established that the defendant is not an innocent purchaser.

For the reasons heretofore and now stated, we ask that the decree below be reversed and the case remanded to the circuit court with instructions to enter a decree canceling the patents issued to the entrymen and women named on pages 68 and 69 of our original brief.

Respectfully,

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

FRED A. MAYNARD,
Special Assistant United States Attorney.

HENRY M. HOYT,
Solicitor-General.

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THE UNITED STATES, APPELLANT,

vs.

WILLIAM A. CLARK.

OBJECTIONS TO MOTION TO ADVANCE.

WALTER M. BICKFORD,
GEORGE F. SHILTON,
Solicitors for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18507

(19,861.)

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OBJECTIONS TO MOTION TO ADVANCE.

The record in the above case is contained in six thousand five hundred and nineteen printed pages, supplemented by the decision of the circuit court of appeals, ninth circuit. Manifestly a brief cannot be prepared on short notice. Counsel should be given an opportunity to examine the printed record and make reference thereto in printed briefs to be filed.

The action is to set aside patents issued for certain lands now owned by appellee, and the case of Hawley *vs.* Diller (178 U. S., 476) cannot apply, for no question of validity of a patent was involved in that case. The action in the Hawley *vs.* Diller case was not commenced to set aside a patent, and the court considered only the question of the authority of the Department of the Interior to cancel an entry prior to issue of patent.

The principle announced by this court in the case of U. S. *vs.* Budd (144 U. S., 155) is clearly the one under which a decision must be reached in the case at bar.

It is true that an action is now pending in the circuit court of the United States, district of Montana, in which a similar question is involved, but the case now before this court involves all the questions *and all the lands* which are involved in the later case. In effect the Department of Justice is calling upon the appellee to twice defend his title to the same land.

There is an error in the statement that about eighty persons are under indictment in Montana for perjury and subornation of perjury in fraudulently obtaining title to lands which are the subject of this suit. The case of U. S. *vs.* R. M. Cobban was tried. During the progress of the trial many of the pending indictments were dismissed by the Government to qualify witnesses. The jury brought in a verdict of "not guilty" in the case tried, and it is not probable that any conviction can be had in any case, not because of any erroneous instructions of the court, but because of the utterly unreliable character of the testimony introduced by the Government.

The statute of limitation cannot run as against cases now pending, and certainly the Government is at liberty to commence any action which it may think necessary in order to protect its rights. What may happen in other cases cannot be here urged as a reason for unreasonable haste herein.

WALTER M. BICKFORD,
GEO. F. SHILTON,
Solicitors for Appellee.